2001

# The State of Utah v. Ben J. Wauneka : Reply Brief

Utah Supreme Court



Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Vernon B. Romney; Attorney General; Attorney for respondent.

Lynn R. Brown; Salt Lake Legal Defender Association; Attorney for Appellant.

IN THE SUPREME COURT OF THE STATE OF UTAH

| | | |
|---|---|---|
| THE STATE OF UTAH<br><br>Plaintiff-Respondent<br><br>vs.<br><br>BEN J. WAUNEKA<br><br>Defendant-Appellant | : | Case No. 14306 |

# REPLY TO RESPONDENT'S BRIEF

LYNN R. BROWN
Salt Lake Legal Defender Association
343 South Sixth East
Salt Lake City, Utah 84102
Attorney for Appellant

VERNON B. ROMNEY
Attorney General
236 State Capitol Building
Salt Lake City, Utah
Attorney for Respondent

IN THE SUPREME COURT OF THE STATE OF UTAH

| | | |
|---|---|---|
| THE STATE OF UTAH<br><br>Plaintiff-Respondent<br><br>vs.<br><br>BEN J. WAUNEKA<br><br>Defendant-Appellant | : | Case No. 14306 |

# REPLY TO RESPONDENT'S BRIEF

LYNN R. BROWN
Salt Lake Legal Defender Association
343 South Sixth East
Salt Lake City, Utah 84102
Attorney for Appellant

VERNON B. ROMNEY
Attorney General
236 State Capitol Building
Salt Lake City, Utah
Attorney for Respondent

TABLE OF CONTENTS



CASES CITED



OTHER AUTHORITIES CITED

IN THE SUPREME COURT OF THE STATE OF UTAH

| | | |
|---|---|---|
| THE STATE OF UTAH,<br>Plaintiff-Respondent | : | |
| vs. | : | |
| BEN J. WAUNEKA<br>Defendant-Appellant | : | Case No. 14306 |

## ARGUMENT

The threshold requirement for admission of hearsay testimony under the "state of mind" exception set forth in rule 63(12)(a) of the Utah Rules of Evidence is that it be relevant to some material issue in the case. In its brief, the respondent asserts that "the explicit purpose for the statements of the deceased was to show her mental state prior to her death as it related to the identity of her murderer and probability of an accident." Brief of Respondent at 7. As the court noted in United States v. Brown, 490 F.2d 758 (D.C. Cir. 1973):

> A victim's extra-judicial declarations of fear or the defendant are admissible under the state of mind exception to the hearsay rule with a limiting instruction only if there is a manifest need for such evidence, i.e., if it is relevant to a material issue in the case. Where there is a substantial likelihood of prejudice to the defendant's case in the admission of such testimony, it is inadmissible if it bears only a remote or artifical relationship to the legal or factual issues raised in the case. (Emphasis Added) Id. at 774.

The hearsay testimony admitted in the present case bears only the most tenuous relationship to issues of the case. The record shows that the defense did not assert that the deceased was assaulted by someone other than the defendant, but rather that there was no assault at all. Identity was therefore not an issue. The question which the jury was called upon to decide, on conflicting evidence, was whether or not any assault took place. Admission of the hearsay testimony that the defendant had beat his wife in the past, introduced on the premise that it showed her state of mind, would of its very nature influence the jury in making its determination of whether a similar occurence took place on the occasion in question. This result would follow in spite of the jury instruction that the statements should not be used for that purpose. Indeed, the state's attorney, in his argument to the jury, suggested that the evidence in the case showed the defendant to be an "experienced wife beater," even though there was no competent evidence to that effect and such a conclusion could only be drawn by using the hearsay testimony for a purpose which the court had instructed the jury it should not be used. It is clear that while the state nominally offered the hearsay testimony to show the deceased's state of mind, the real impact sought from the testimony was to place before the jury statements indicating that the defendant had beat his wife in the past. Such highly prejudicial hearsay testimony, offered under the guise of the state of mind exception, has been uniformly held inadmissible even when it is relevant to an issue of the case. See, e.g., People v. Lew, 68 Cal. 2d 744, 441 P 2d 942 (1968); People v. Hamilton, 55 Cal. 2d 881

not a material issue, there is no justification for its admission. See State v. Kump, 76 Wyo. 273, 301 P.2d 808 (1956).

The respondent alleges that the deceased's state of mind was relevant because the defense contended that her death was the result of an accident. While it is true that this ground has been recognized as a basis for admitting state of mind testimony, a close scrutiny of this line of cases reveals that such is only the case when the state of mind of the deceased is expressed in such terms as would negate the claim that death resulted accidentlly. For instance, where the defendant claimed that the victim died as a result of an accidental discharge of a weapon which she was holding, her statements that she was afraid of guns, and therefore unlikely to handle them, was relevant to a material issue of the case. Here, however, the deceased's statements in no way counter the contention that she could have suffered injuries from falls while intoxicated. Again the supposed issue which the state of mind evidence is relevant to, likelihood of accident, is seen to bear only the most tenuous relationship to the case, and in fact the hearsay testimony does not speak to the probability of accident at all. It is also important to note that even if this testimony had been relevant to the issue of accidental death, where the evidence implies past misconduct on the part of the defendant so as to substantially prejudice his case, its relevance is overriden by its potential for misuse by the jury. People v. Lew, supra.

The respondent offered this court four decisions which it felt were in accord with the trial court's ruling in this case. One of these decisions, Bustamonte v. People, 157 Colo. 146, 401 P.2d 597 (1965), is clearly inappropriate authority for the case at bar because a simple review of its facts reveals that the state of mind evidence received in that case was relevant to the issue of self-defense. The three other decisions cited by the respondent, State v. Radabaugh, 471 P.2d 582 (Idaho, 1970), State v. Shirley, 7 Or. App. 166, 488 P.2d 1401 (1971), and State v. Gause, 107 Ariz. 491, 489 P.2d 830 (1971), were considered by the court in United States v. Brown, supra, and found to be both poorly reasoned and counter to the clear weight of authority. As the court noted in Brown:

> There are a number of other cases which have allowed in testamony of this type on the basis of various errors in reasoning or simple lack of concern. One of the principle problems which brings this about is a court's understandable eagerness to find an "easy" rule, simple in operation. This leads to a tendency to adopt a mechinistic approach devoid of analysis. For example, in State v. Radabaugh, . . . the Idaho Supreme Court, dealing with a hearsay declaration of fear on the part of the deceased victim, simply identified the statement as probative on the issue of the state of mind of the declarant, referred to the fact that a limiting instruction had been given and then pronounced it admissible in a conclusory and offhanded manner. Such a simplistic approach sidesteps any preliminary determination of relevance and does not begin to weigh the possible prejudice contained in such statements.
>
> Another group of cases seems to consider such hearsay admissible if there are circumstantial indications of its reliability or some type of corroborative evidence. For example, in State v. Shirley, . . . the court found the declaration of fear to have been made in a manner "'perfectly natural' under the circumstances."

. . . .

> Similarly, in State v. Gause, . . . the Arizona Supreme Court, apparently attempting to adopt a "progressive" approach, laid down a rule that such expressions of fear are admissible as long as they have sufficient reliability. While an attempt to break out of the confines of some of the archaic niceties of the hearsay exceptions in favor of admissibility dependent only on the presence of special guarantees of reliability has something to commend it, this only answers half the question. That is, the Gause court (and the other courts which place so much reliance on such indications of special trustworthiness) failed to move on to the second question--that of relevance which also has something to commend it. The court's rule simplified the question of whether certain testimony falls within the state of mind exception to the hearsay rule but entirely ignored the relevance balancing process which seeks to avoid undue and unnecessary prejudice and confusion.
>
> The undesirable results of the application of such a single-step approach become apparent in those cases in which courts allow the admission of such hearsay declarations of fear in spite of the fact that the state of mind of the declarant simply bears too tenuous a relationship to the issues in the case. For example, in State v. Shirley, . . . the court, on facts strikingly similar to those at hand here, felt that the evidence should be admitted on the rather flimsy ground that "the state had a right to show the state of mind of the victim at the time of and shortly prior to the homicide and for that purpose to show what circumstances as expressed by the victim contributed thereto." Here again there is an undesirable failure to address the relevance issue. The court considered its task at an end merely by identifying the statement as bearing on the victim's state of mind, neglecting to undertake the vital step of balancing the necessity for the evidence and it probative value against the stron likelihood of extremely damaging prejudicial effects. (490 F.2d at 772-73)

It is further noted that in 1976 Idaho adopted the reasoning in Brown as evidenced in the case of State v. Goodrich, 97 Id. 472, 546 P.2d 1186 (1967).

The error which the Brown court revealed in the cases cited by the respondent was repeated by the trial court in the instant case.

Additionally, this error was compounded when the court allowed the state's attorney to argue to the jury that Mrs. Wauneka's statements, that she feared her husband because he beat her in the past, were evidence that such beatings had occurred. Any such inference is clearly impermissible, as the court recognized in its instructions to the jury, and allowing the state's attorney to suggest otherwise totally negated the effect of the court's limiting instruction.

The record shows that the trial court admitted into evidence certain highly prejudicial statements, which were clearly and admittedly hearsay, under the state of mind exception. The record further shows that the deceased's state of mind was simply not relevant to any material issue in the case, and that the prosecution's sole purpose in placing the evidence before the jury was to play upon the inflammatory nature of the statements as they related to the defendant, and not for the purpose of showing the deceased's state of mind. Under these circumstances the admission of the hearsay is error of the most prejudicial nature. As the court noted in Brown:

> Quite a number of courts have confronted facts similar to those here involving hearsay statements made by the victim of a homicide which inferentially implicate the defendant. Such statements by the victims often include previous threats made by the defendant towards the victim, narrations of past incidents of violence on the part of the defendant or general verbalizations of fear of the defendant. While such statements are admittedly of some value in presenting to the jury a complete picture of all the facts surrounding the homicide, it is generally agreed that their admissibility must be determined by a careful balancing of their probative value against their prejudicial effect. Courts have recognized that such statements are fraught with inherent dangers and require the imposition of rigid limitations.

> The principle danger is that the jury will consider the victim's statement of fear as somehow reflecting on defendant's state of mind rather than the victim's--i.e., as a true indication of defendant's intentions, actions, or culpability. Such inferences are highly improper and where there is a strong likelihood that they will drawn by the jury the danger of injurious prejudice is particularly evident.

490 F.2d at 765-66. As stated by the court in People v. Purvis, 13 Cal. Rptr. at 804, 362 P.2d at 716 (1961):

> It may be that an inference as to the victim's conduct can be drawn from the victim's state of mind, but certainly no permissible inference can be drawn therefrom as to the defendant's character or actions.

Though courts are uniform in adopting this posture, the trial court in the instant case allowed the prosecution to argue to the jury that the hearsay testimony, purportedly offered exclusively to show the deceased's state of mind, was evidence that the defendant had beat his wife in the past and evidence from which they could infer that he had beat her to death on the night in question. Such grevious error demands reversal.

## CONCLUSION

A separate statement by Justice Bakes in State v. Goodrich, supra, seems to reach the very heart of the problem when he stated:

> The rule announced in State v. Radabaugh, 93 Idaho 727, 471 P.2d 582 (1970) which permits a witness to testify concerning conversations with the deceased outside the presence of the defendant is an intrusion on the right to confrontation guaranteed by the Sixth Amendment of the United States Constitution, as announced in Douglas v. Alabama, 380 U.S. 415, 85 S. Ct. 1074, 13 L.Ed. 2d 934 (1965), and Dutton v. Evans, 400 U.S. 74, 91 S. Ct. 210, 27 L. Ed. 2d 213 (1970).

Even if those statements are limited to direct evidence of the state of mind of the deceased, where that issue is relevant in the case (see footnote 7 of the majority opinion), they may not survive the broad sweep of the Sixth Amendment's guarantee.

DATED this ____ day of January, 1977.

Respectfully submitted,

LYNN R. BROWN
Attorney for Appellant